

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF IDAHO**

<b>IN RE</b>	)	
	)	
<b>ERIC DEAN BOGGAN,</b>	)	<b>Case No. 99-20917</b>
	)	
<b>Debtor.</b>	)	
<hr/>	)	
	)	
<b>ERIC DEAN BOGGAN,</b>	)	<b>Adversary No. 99-6190</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>MEMORANDUM OF DECISION</b>
	)	<b>AND ORDER</b>
<b>HOFF FORD, INC., d.b.a., HALL-</b>	)	
<b>COPELAND FORD, LINCOLN,</b>	)	
<b>MERCURY, MAZDA,</b>	)	
	)	
<b>Defendant.</b>	)	
<hr/>	)	

HONORABLE TERRY L. MYERS, U.S. BANKRUPTCY JUDGE

Milan E. Miller, Lewiston, Idaho, for the Plaintiff.

Charles A. Brown, Lewiston, Idaho, for the Defendant.

Before the Court are cross motions for summary judgment in this adversary proceeding. The parties agree that there are no genuine issues of material fact in dispute, and that summary judgment is appropriate because the case presents solely an issue of law. The Court agrees.

Having considered the submissions and arguments of the parties and the applicable authorities, the Court concludes that the motion of Plaintiff shall be denied, and that the motion of Defendant shall be granted and the adversary proceeding dismissed, without award of costs or fees to either party.

## **BACKGROUND**

In May 1999, Eric Boggan (“Plaintiff”) took his 1992 Mazda in for repairs to Hall Copeland Mazda in Lewiston, Idaho, a business operated by Hoff Ford Inc., (“Defendant”). The bill for these repairs was approximately \$700.00. Plaintiff was unable to pay for the repairs, so Defendant retained possession of his vehicle as security for payment. Idaho Code § 45-806.

That was still the situation when, two months later, Plaintiff filed his petition for relief under Chapter 13 on August 2, 1999. On August 3, Plaintiff’s attorney faxed a letter to the Defendant giving notice of Plaintiff’s bankruptcy and demanding return of the vehicle. Defendant did not turn over the vehicle on this request. On August 9, Plaintiff’s counsel spoke with Defendant’s counsel and advised him that Defendant’s retention of the vehicle post-petition was viewed by Plaintiff as violative of the automatic stay. This, too, was ineffective in motivating return of the vehicle.

On August 10, Plaintiff filed this adversary proceeding seeking the return of the vehicle alleging it was required for transportation to and from his job and thus necessary for his reorganization. Plaintiff requested, in addition to turnover, that the Court find that Defendant violated the automatic stay. Plaintiff seeks under § 362(h) to recover his

damages and costs and fees incurred in the present litigation due to the alleged violation of the stay.

On August 11, 1999, Plaintiff filed a motion for preliminary injunction seeking the return of the vehicle pending resolution of the adversary proceeding.

Defendant resisted turnover without some sort of adequate protection, as it believed possession was critical to its lien rights against Plaintiff and the vehicle. At hearing on August 17, the Court granted Plaintiff's motion on the condition that Defendant would be allowed, in this adversary proceeding and the related chapter 13 case, to assert its lien rights as if it had not relinquished possession.

By his motion for summary judgment, Plaintiff asks the Court to conclude that Defendant violated § 362(a)(3) by refusing to immediately and unconditionally return the vehicle on Plaintiff's post-petition demand, and that this was a willful violation of stay mandating an award of costs and fees under § 362(h). Defendant's motion for summary judgment requests the Court to find that, as a matter of law, its actions did not violate § 362(a) and that the parties should bear their own costs and fees.

## **DISCUSSION**

Before addressing the question of stay violation, it is appropriate to identify the nature of Defendant's interest in the vehicle.

Defendant was given possession of the vehicle by Plaintiff in order to repair it. After completion of these repairs, Plaintiff failed to pay for the work performed. Idaho Code § 45-806, found in Title 45, Chapter 8 ("Miscellaneous liens"), states in pertinent part:

Any person, firm or corporation, who makes, alters or repairs any article of personal property, at the request of the owner or person in legal possession thereof, has a lien . . . in the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid.

Under the circumstances present here, Idaho Code § 45-806<sup>1</sup> gives Defendant a statutory lien<sup>2</sup> upon Plaintiff's vehicle for the repairs which were performed. *American Machine Company v. Fitzpatrick*, 92 Idaho 416, 420, 443 P.2d 1013, 1017 (1968).<sup>3</sup>

This lien was perfected by Defendant's retained possession of the vehicle, a possession gained lawfully prior to the bankruptcy petition being filed. Defendant was entitled to retain possession of the vehicle until compensated for its services. § 45-806. There is nothing in the record to indicate that this prepetition statutory lien of Defendant is avoidable. *See* § 545.<sup>4</sup>

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<sup>1</sup> Idaho Code § 49-1701 also recognizes a possessory lien in favor of those repairing motor vehicles. However, Defendant does not rely on this provision, perhaps because the notice to the owner required by § 49-1702 was not given.

<sup>2</sup> Statutory liens are defined by § 101(53) which provides:

"[S]tatutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute[.]

<sup>3</sup> *American Machine* makes clear that the lien of § 45-806 arises and "automatically attaches" upon the garageman's repair. 92 Idaho at 420, 443 P.2d 1017. It also makes clear that the proviso in § 45-806 regarding notice to creditors with consensual liens in the vehicle relates solely to the question of lien priority, and does not effect the attachment of the lien or require the garageman to give notice to the owner of the vehicle. *Id.*

<sup>4</sup> The provisions of § 545(1), (3) and (4) are facially not applicable. The requirements of § 545(2) are not satisfied; the possession of the vehicle by Defendant at the time of the  
(continued...)

The Court next turns to the contention that § 362(h) requires compensation to Plaintiff for the alleged violation of stay when this lien creditor refused to part with possession. Section 362(h) provides:

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

The parties have debated whether the conduct of the Defendant was “intentional” or “willful” within the reach of § 362(h).<sup>5</sup> But for § 362(h) to apply at all, the Court must first find that the automatic stay has actually been violated by Defendant’s conduct.

In this case, Plaintiff alleges that Defendant’s refusal to return the vehicle after a post-petition demand was made violated § 362(a)(3) which stays “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]”

Plaintiff has not identified any “act” of Defendant post-petition which violated the stay, rather it was Defendant’s refusal to take an act, i.e., relinquish possession, to which Plaintiff points. The cases relied upon by Plaintiff to establish that a failure to surrender property of the estate is the equivalent of an act to “exercise control over” that property do not deal with possessory statutory liens and are thus distinguishable. Plaintiff has provided no direct authority which establishes that a statutory lien creditor, whose lien is

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<sup>4</sup>(...continued)  
filing of the petition for relief necessarily precludes any bona fide purchaser as of that date without notice of the claimed lien. *In re Scott*, 88 B.R. 196, 198 (Bankr. E.D. Ark. 1988).

<sup>5</sup> See generally, *In re Eash*, 225 B.R. 489, 98.4 I.B.C.R. 96 (Bankr. D. Idaho 1998); *In re Christensen*, 98.1 I.B.C.R. 15 (Bankr. D. Idaho 1998).

dependent on possession,<sup>6</sup> violates the stay unless it unconditionally surrenders the property.

This Court has observed that, while § 362(a)(4) stays acts to “create, perfect, or enforce” a lien:

Significantly, the [automatic stay] does not explicitly prohibit acts to extend, continue, or renew otherwise valid statutory liens.

*In re Silva*, 215 B.R. 73, 77 (Bankr. D. Idaho 1997) quoting *In re Morton*, 866 F.2d 561, 564 (2<sup>nd</sup> Cir. 1989). Moreover, § 362(b)(3) provides:

(b) The filing of a petition under section 301, 302, or 303 . . . does not operate as a stay –

. . .

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title[.]<sup>7</sup>

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<sup>6</sup> See, *In re Shama Mining Group, Inc.*, 90 I.B.C.R. 80, 83 (Bankr. D. Idaho 1990) (“[T]he [§§ 45-805 and 45-806] lien, dependent upon possession, is waived or lost only by the lien holder who voluntarily or unconditionally parts with possession or control of the personal property[.]”)

<sup>7</sup> Section 546(b)(1) provides:

The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that –

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such

(continued...)

Under the case law and § 362(b)(3) it appears that this statutory lien creditor did not violate the stay by continuing and maintaining the possession which perfects its lien. *Accord, Eaton v. River City Body Shop (In re Eaton)*, 220 B.R. 629, 630-631 (Bankr. E.D. Ark. 1998) (similarly construing and applying Code provisions in regard to Arkansas' vehicle repairman's lien statute).

The violation of stay which is prerequisite for application of § 362(h) is lacking. Plaintiff is therefore not entitled to damages, costs or attorney's fees under that provision.

The portion of this action seeking turnover was resolved by the Court's prior order which facilitated return of the vehicle while preserving Defendant's arguments of a perfected lien status under Idaho Code § 45-806. The complaint also seeks relief under § 362(h) which, by this decision, is denied. No other issues are framed by the pleadings in this adversary proceeding, and dismissal is appropriate.<sup>8</sup>

## **ORDER**

The Court therefore finds that there are no genuine issues of material fact in dispute, and that the Defendant is entitled to judgment as a matter of law. Accordingly, Plaintiff's Motion for Summary Judgment is DENIED. Defendant's Motion for Summary Judgment is GRANTED and the instant adversary proceeding shall be, and the same is hereby DISMISSED, the parties each to bear their own costs and fees.

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<sup>7</sup>(...continued)  
maintenance or continuation.

<sup>8</sup> Issues as to the priority and value of the Defendant's lien, though alluded to by the parties in their arguments, will be resolved in the Chapter 13 case.

DATED this 30th day of November 1999.